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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-5993

JOHN E. TEST, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (App. 27) is reported at 486 F.2d 922.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 1973 (App. 35). A timely petition for rehearing was filed on November 14, 1973, and was denied by the court of appeals on November 26,

1973 (App. 36). The petition for a writ of certiorari was filed on December 27, 1973, and was granted on June 17, 1974 (App. 37).

The jurisdiction of this Court is based on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to * * * trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *.

Sections 1861-1869 and 1871 of Title 28, United States Code, are set forth in the appendix to petitioner's brief.

QUESTION PRESENTED

The petition for a writ of certiorari was granted, limited to the following question:

1. Does the Jury Selection and Service Act of 1968, 28 U.S.C. 1861, *et seq.*, require that a defendant be provided access to jury lists and other jury records upon the filing of a sworn statement in compliance with 28 U.S.C. 1867(d) in support of a motion to quash and upon the presentation of a *prima facie* claim of constitutional dimension, *i.e.*, the systematic exclusion of Mexican-Americans from the jury array.

STATEMENT

Petitioner was indicted on October 26, 1972, by a federal grand jury in the District of Colorado for knowing and intentional distribution of lysergic acid diethylamide (LSD), in violation of 21 U.S.C. 841 (a)(1). On January 2, 1973, petitioner filed, *inter alia*, a Motion to Dismiss Indictment because of Denial of a Fair and Impartial Jury (App. 11-12) and Defendant's Motion to Inspect, Copy and Reproduce the Master Jury Wheel and Qualified Jury Wheel (App. 13-14).

The primary grounds alleged in the motion to dismiss were that the master lists for grand and petit juries were drawn from Colorado voter registration lists which "exclude in disproportionate numbers persons with Spanish surnames, students and blacks. thus violating 28 U.S.C. § 1962 [sic] and the defendant's rights under the Fifth and Sixth Amendments * * *" (App. 11) and that "the class of persons who actually served on the Grand Jury in question and will serve on the petit jury systematically excluded and will exclude those persons under the age of thirty five, with Spanish surnames, of the Negro race, and students, all in violation of 28 U.S.C. § 1862 and the defendant's rights under the Fifth and Sixth Amendments * * *" (App. 11-12).

Attached to petitioner's motion to inspect the records for the jury wheel was an affidavit in which petitioner's counsel recited certain evidence which had been adduced in a state court trial on November 8,

1972 (App. 15-16). That evidence, according to the affidavit, established that 5.34 percent of the population of Boulder County twenty-one years of age or older is Spanish surnamed, while the percentage of Spanish surnamed persons on the jury list in that case was 1.92. The district court, at a hearing held on January 23, 1973 (App. 17-25), denied both the motion to inspect [1] and the motion to dismiss without a written opinion.

Petitioner was convicted after a trial by jury. The judgment of conviction was affirmed by the court of appeals on November 1, 1973 (App. 27-34), and a petition for rehearing was denied (App. 36). The opinion of the court of appeals does not discuss the inspection of jury records or jury discrimination issues, except to say that the court found no merit in "appellant's other contentions" (App. 34).

INTRODUCTION AND SUMMARY OF ARGUMENT

The question upon which the petition was granted is whether the Jury Selection and Service Act of 1968, U.S.C. 1861, *et seq.*, requires that a defendant be

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[1] In denying petitioner's motion to inspect, the court stated (App. 24):

> If you want to look at the jury list some time, we will hire some extra help and you can come down and you can peek at it all you want to, but it's not going to be had in this case. I have told you that we concede that the percentage of jurors that are black or Spanish in surname is not a pro rata percentage that those groups bear to the total population. We concede that.

given access to jury lists when he files a sworn statement in compliance with 28 U.S.C. 1867(d) and presents a *prima facie* claim of constitutional dimension. As so framed, the question must be answered in the affirmative since under even the most restrictive construction of the Act, access to jury lists must be provided if a defendant presents a *prima facie* constitutional claim. Under this formulation of the question, the only issue in the present case is whether petitioner has alleged a *prima facie* constitutional violation. It is our position that he has not.

Petitioner's jury claim, however, also presents related issues not fully articulated, but fairly comprised, in the question on which the petition was granted. The question as presently stated assumes a legal standard to be applied in determining when access to jury lists should be granted. In our view the formulation of that legal standard is a threshold issue to be decided. We suggest that the question may appropriately be recast as follows: (1) whether the right to inspect granted by the Act is unconditional, or is conditioned on a *prima facie* showing of noncompliance with the Act's selection procedure; (2) whether, if the right to inspect is unconditional, denial of that right is a material error in the absence of a *prima facie* claim of systematic exclusion; and (3) whether, if the error is not material in the absence of such a claim, petitioner has presented such a claim here.

We submit that the Act requires that a defendant be provided access to jury records as a matter of

right upon the timely filing of a motion to inspect. Thus, in our view the district court erred in denying such access to petitioner. The error could be held to be harmless, if, as some courts of appeals have indicated, the Act is directed only at the prevention of purposeful discrimination. Since petitioner has alleged only that use of the voting lists results in underrepresentation of certain categories of persons, his claim is insufficient under that standard.

In our view, however, the Act imposes affirmative obligations beyond the prevention of purposeful discrimination. Its language and legislative history both indicate that Congress required jury selection plans to be formulated to achieve the goal of selection from a cross section of the community. While we believe it unlikely that petitioner will be able to show that the use of voting lists resulted in underrepresentation of a magnitude sufficient to violate this statutory standard and thus to support his motion to dismiss, we nonetheless conclude that the district court's error requires that this case be remanded for consideration of petitioner's claim after he has been afforded an opportunity to inspect the jury lists.

I

THE DISTRICT COURT ERRED IN DENYING PETITIONER'S MOTION TO INSPECT THE MASTER AND QUALIFIED JURY LISTS

The district court's finding that petitioner had failed to present evidence sufficient to warrant granting his motion to dismiss is not subject to dispute

under this Court's limited grant of certiorari, and was in any event correct. We submit, however, that the court should have granted petitioner's motion to inspect the jury lists and deferred action on the motion to dismiss until petitioner had had an opportunity to evaluate the data contained in the lists.

The Act prescribes exclusive procedures for challenging compliance with its provisions. 28 U.S.C. 1867(e). A motion to dismiss the indictment on the ground of "substantial failure" to comply with the selection provisions of the Act must be filed before the beginning of the voir dire examination or within seven days after grounds therefor were or could have been discovered.[2] 28 U.S.C. 1867(a)-(c). Such a motion must be accompanied by "* * * sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of [the Act]

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[2] Since the motion here was filed before voir dire, the only possible question of timeliness is whether it was filed within seven days after the defendant discovered, or could have discovered by the exercise of due diligence, the ground for the motion. In a sworn statement attached to his motion to inspect, petitioner recites, as the basis for his motion, evidence adduced at a state court hearing conducted on November 8, 1972. Although the inspection motion was not made until January 2, 1973, the motion was filed within seven days after the attorney who was counsel in the state court hearing assumed responsibility for defending petitioner (R., Vol. II, Crim. Docket Card 72-CR-352). While the statutory time limit of course does not depend upon the identity of counsel representing the moving party, the district court here has not found that either petitioner or his earlier counsel could have, by the exercise of due diligence, earlier discovered the evidence adduced at that unrelated state court hearing.

* * *." 28 U.S.C. 1867(d). Upon the filing of such a motion and sworn statement, the moving party is allowed to present in support of his motion, among other things, records and papers used in the selection process. *Ibid.*

Section 1867(f) governs the disclosure of records used in the jury selection process, and that Section expressly provides that "[t]he parties in a case shall be allowed to inspect, reproduce, and copy such records or papers at all reasonable times during the preparation and pendency of [a motion to dismiss] * * *." Section 1867(f) on its face thus confers a right of access to jury records without any required showing by the requesting party, and this literal reading of the statute has been adopted by several courts of appeals. See, *e.g.*, *United States* v. *Beaty*, 465 F.2d 1376 (C.A. 9); *United States* v. *Tijerina*, 446 F.2d 675 (C.A. 10); see also *Mobley* v. *United States*, 379 F.2d 768 (C.A. 5).

Indeed, such an unqualified right of discovery appears to be necessary to the effective use of the challenge procedures specified in the Act (summarized above), and nothing in the Act's legislative history suggests that Congress intended that a party's right to inspect jury records be qualified in any manner.[3]

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[3] A 1966 bill containing proposed amendments to the federal jury selection system contained a provision almost identical to 28 U.S.C. 1867(f). The legislative history of the 1966 bill indicated that parties would not automatically be given access to jury records, but rather, access would require production of evidence of noncompliance with the bill's substantive provisions. See H. Rep. No 1678, 89th Cong., 2d

A contrary conclusion has been reached only by construing 28 U.S.C. 1867(d) as a limitation on the right of inspection accorded by Section 1867(f) —that is, by requiring the filing of a Section 1867 (d) sworn statement as a precondition to the right to inspect. See, *e.g.*, *United States* v. *Grey*, 355 F. Supp. 529 (W.D. Okla.). That construction, which would require a party to establish a basis for a non-compliance claim before being given access to the necessary evidence, is contrary to the plain language of Section 1867(f), which permits inspection in the "preparation" of a motion to dismiss.

In our view, the language and structure of the Act indicate that Congress intended the challenge procedures of Section 1867 to operate in the following manner: Upon the filing of a timely request, parties are to be accorded the right to inspect jury records. If the inspection discloses facts which a party be-

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Sess., pp. 20-21. The House Report referred to the need to prevent the use of inspection as a delaying tactic and the use of jury records for the purpose of jury tampering. The 1968 Act effectively prevents the use of inspection for delay because challenges to a jury selection plan must be made before the beginning of *voir dire*, and in any event within seven days after grounds for challenge were or could have been discovered. 28 U.S.C. 1867(a).

Inspection of jury records will not, in our view, present a substantial risk that the records will be used for tampering purposes since the number of names appearing on the master and qualified lists will, as a practical matter, effectively preclude such use. Moreover, to the extent that the possibility of tampering is a matter of concern, the district court can properly enter a protective order restricting access to the lists to counsel. See *United States* v. *Beaty*, *supra*.

lieves support a claim of non-compliance with the Act, those facts should be set forth in a sworn statement accompanying a motion to dismiss. If proof of the facts alleged would be substantial evidence of non-compliance, the district court should then hold a hearing at which relevant evidence, including jury records, could be presented. Accordingly, we submit that the Act provides an unqualified right of inspection of jury records and that the district court therefore erred in denying petitioner's request for inspection.[4]

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[4] If, contrary to our submission, the Act is interpreted to require the defendant to present evidence of substantial non-compliance with the Act before he is allowed to inspect the records, petitioner's submission was insufficient. The affidavit submitted recited underrepresentation of Spanish surnamed individuals and young people in Boulder County (App. 15-16). But Boulder County is one of 23 counties in the Denver Division of the District (App. 2) and contains only 8.7 percent of the Division's population and only 5.9 percent of the population for the District. United States Department of Commerce, Bureau of Census, 1970 Census of Population: General Population Characteristics, Advance Report, Colorado. The master jury wheel for the petit jury for the present case was drawn from the Denver Division (App. 3-4). The members of the grand jury were selected from the wheels of each of the three divisions within the entire district (App. 2-8). Thus, the allegations were not sufficiently significant to constitute substantial evidence of a failure to comply with the Act within either the entire judicial district or the Denver Division.

II

THE DISTRICT COURT'S ERROR IN REFUSING TO ALLOW INSPECTION OF JURY RECORDS WAS MATERIAL

The materiality of the district court's error should be determined in light of petitioner's particular claim of noncompliance with the Act. Thus, the specific question to be resolved in this case is whether Congress intended that lists of actual or registered voters be accorded conclusive validity as a source of names for jury service in the absence of a history or present practice of electoral discrimination in the district or division where the jury selection plan is challenged.

The Act explicitly requires that federal jury selection plans provide for random selection as the means, and for the use of actual or registered voter lists as a source, for jury selection. 28 U.S.C. 1863. While voter lists are thus the required primary source for jurors, the Act also specifies (28 U.S.C. 1863(b)(2)) that "[t]he plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of [the Act]." Section 1861 provides that juries are to be "selected at random from a fair cross section of the community * * *", and Section 1862 declares that no citizen shall be excluded from jury service "* * * on account of race, color, religion, sex, national origin, or economic status."

Petitioner's claim is that the use of voter lists results in a degree of underrepresentation [5] of certain groups (blacks, persons with Spanish surnames, persons between the age of 21 and 35, and students) sufficient to require resort to supplementary sources. Petitioner does not contend that jury lists are complied in a discriminatory fashion; nor does he contend that there is a history or present practice of electoral discrimination against these groups in Colorado.

The courts of appeals for the Ninth and Second Circuits have ruled, in effect, that voter lists need not be supplemented under the Act unless there is a showing that the groups alleged to be underrepresented were the subject of electoral discrimination within the district where the jury selection plan is at issue. See, *e.g.*, *United States* v. *Guzman*, 468 F.2d 1245 (C.A. 2), certiorari denied, 410 U.S. 937; *United States* v. *James*, 453 F.2d 27 (C.A. 9); *United States* v. *Bennett*, 445 F.2d 638 (C.A. 9), certiorari denied, 404 U.S. 1023; *United States* v. *Parker*, 428 F.2d 488 (C.A. 9), certiorari denied, 400 U.S. 910.

The above decisions are based on the premise that a defendant must establish systematic exclusion of a cognizable class in order to challenge successfully

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[5] Underrepresentation refers to the disparity between the percentage of members of a cognizable class (*e.g.*, blacks, Spanish surnamed persons) on the jury list and the percentage of members of the class in the voting age population.

a jury selection plan.[6] In effect, these decisions have adopted the standards of this Court's Sixth Amendment opinions (*e.g.*, *Whitus* v. *Georgia*, 385 U.S. 545; *Hernandez* v. *Texas*, 347 U.S. 475) as controlling under the Act. If this view is correct, then the failure to allow inspection of the lists here was not a material error in the absence of a showing, or even an allegation, by petitioner of past or present voter discrimination in Colorado. We believe, however, that the Act created broader rights than those established under Sixth Amendment principles, and, specifically, that substantial underrepresentation of a cognizable group (such as blacks or Mexican-Americans) would necessitate resort to supplementary sources under Section 1863 (if it has a substantial

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[6] This premise is explicit in the Ninth Circuit decisions, and, although not expressly referred to in *United States* v. *Guzman*, *supra*, it is an underpinning of that decision. We note, however, that subsequent decisions of the Second Circuit suggest that the decision in *Guzman* was, in large part, attributable to the court of appeals' doubts as to whether the groups in issue (age groups) constituted cognizable classes for purposes of the Act. See *United States* v. *Jenkins*, *infra*, 496 F.2d 57 (C.A. 2), petitions for writs of certiorari pending, Nos. 73-6639, 73-6826, and 73-6903; *United States* v. *Fernandez*, *infra*, 480 F.2d 726 (C.A. 2).

In *United States* v. *Dangler*, 422 F.2d 344 (C.A. 5), the court of appeals suggested that while unsupplemented voter lists might not be conclusively valid as the source of jurors even in the absence of electoral discrimination, persons who choose not to register are not a cognizable group for purposes of the Act. This suggestion was made in response to a contention that the use of voter lists resulted in underrepresentation of members of the Jehovah's Witness sect because such persons do not register as a matter of conscience.

impact on selection of jurors, see pp. 16-18, *infra*) even though no history of voter discrimination against the group is proved.[7] As the court of appeals stated in *United States* v. *Fernandez*, 480 F.2d 726, 733 (C.A. 2):

> * * * [T]he * * * Act goes beyond prohibition of "intentional" distortions and provides that in certain cases affirmative measures must be undertaken to insure that "juries [are] selected at random from a fair cross section of the community * * *."

See also *United States* v. *Jenkins*, 496 F.2d 57 (C.A. 2), petitions for writs of certiorari pending, Nos. 73-6639, 73-6826, and 73-6903.

Indeed, it is difficult to see how the Act would admit of any other construction. As noted earlier, Section 1863 expressly provides that the use of supplementary sources is required where necessary to foster not only the non-discrimination policy of Section 1862, but also the policy of Section 1861 that juries be selected from a fair cross section of the community. A holding that the use of supplementary sources is required only when there is evidence of past or present electoral discrimination would thus be contrary to the plain language of the Act.

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[7] This is not to say that patterns of discrimination are irrelevant in challenges to plans under the Act. For example, it is entirely possible that proof of the existence of past or present patterns of electoral discrimination might mean that a party need show a lesser degree of underrepresentation in order successfully to challenge a jury selection plan.

The legislative history confirms the correctness of our construction of the Act. The House Report specifically states that voter lists are to be supplemented "* * * whenever they do not adequately reflect a cross section of the community." H. Rep. No. 1076, 90th Cong., 2d Sess., p. 4. And the policy basis for this requirement is explained in the House Report as follows (*id.* at 8):

> Jury performance will be enhanced as well by closer approximation of the cross sectional goal under the bill. It must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it. As long as there are significant departures from the cross sectional goal, biased juries are the result—biased in the sense that they reflect a slanted view of the community they are supposed to represent.

See also S. Rep. No. 891, 90th Cong., 1st Sess.; 114 Cong. Rec. 3992 (remarks of Rep. McCulloch).

In short, Congress intended that voter lists be supplemented by other sources where the use of voter lists results in substantial failure to achieve the cross sectional goal of Section 1861. Since, on this record, it is not possible to know the degree of underrepresentation, if any, of various groups on Colorado's voting lists, and thus the possible deviation of Colorado federal juries from the community cross section, we believe that petitioner was entitled to inspect the jury lists.

That is not to suggest, however, that he is likely to prevail in his challenge to the selection plan. While voter lists will almost inevitably involve some degree of underrepresentation of certain groups, they remain the best "cross-sectional list of the nonracial classes." Gewin, *The Jury Selection and Service Act of 1968: Implementation in the Fifth Circuit Court of Appeals*, 20 Mercer L. Rev. 349, 368 (1969). Whether voter lists also adequately reflect the racial groups in the community depends in large part on whether there is a history of electoral discrimination and on the efficacy of remedial legislation such as the Voting Rights Act of 1965. Here, where it is not alleged that patterns of discrimination have existed in Colorado, petitioner must, in our view, demonstrate a greater degree of underrepresentation than would be required where there is evidence of patterns of discrimination.[8]

A "fair" cross section need not be a mathematically precise cross section. Congress specifically did not intend to require either mathematical precision or proportional representation in jury selection. As the House Report explained (H. Rep. No. 1076, *supra*, at 5):

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[8] Petitioner must, of course, show that the groups which are claimed to be underrepresented are cognizable classes for purposes of the Jury Selection Act. There is a substantial question whether persons under age 35 and students constitute such classes, since they are not referred to in the Act. See 28 U.S.C. 1862; *United States* v. *Kuhn*, 441 F.2d 179 (C.A. 5). But see *United States* v. *Butera*, 420 F.2d 564 (C.A. 1); *Hamling* v. *United States*, No. 73-507, decided June 24, 1974.

> The voting list need not perfectly mirror the percentage structure of the community. But any substantial percentage deviations must be corrected by the use of supplemental sources. Your committee would leave the definition of "substantial" to the process of judicial decision.

The Act contains no guidelines as to what constitutes "substantial" deviation, but the rejection of a mechanical "percentage structure" requirement suggests that substantial deviation should be determined by analysis of the practical impact of the underrepresentation rather than by focusing simply on the magnitude of the deviation.

In our view the proper approach to determination of the significance of the underrepresentation resulting from the use of voter lists is that employed by the court of appeals in *United States* v. *Jenkins*, *supra*. *Jenkins* involved a claim that the use of voter lists resulted in substantial underrepresentation of blacks on the jury lists in the New Haven Division of the District of Connecticut. The defendants contended that the sole measure of substantial deviation from the cross sectional goal was the ratio of the black percentage of the adult population to the black percentage of the adults available for jury service. The record revealed that this ratio was 5 to 3, or, stated differently, that the use of voter lists resulted in a 40 percent underrepresentation of blacks on the jury lists.

The court of appeals rejected the contention that the ratio was the sole test of whether the deviation

from the cross sectional goal was permissible. The court noted that while the ratio appeared substantial, in fact it had an insubstantial impact if analyzed in terms of "* * * the difference that would result in the absolute racial composition of the venire as a result of the underregistration of blacks as voters" (496 F. 2d at 65). In *Jenkins* correction of the underrepresentation would have added only one additional black to an average array of 50 to 60 veniremen. Holding that "[t]he test of fairness intended by Congress is the more practical one of the difference in absolute numbers rather than a difference in percentages" (496 F.2d at 66), the court of appeals concluded that the difference of one black in a panel of 50 to 60 jurors was not substantial. See our memorandum in opposition in *Hall* v. *United States*, petition for a writ of certiorari pending, No. 77-6639 (a copy of which is being served on petitioner).

Here, however, petitioner was deprived of an opportunity to develop the requisite facts bearing on his contention that the grand jury which indicted him and the petit jury which was to try him were not selected in accordance with the Act's requirements. We conclude, therefore, that the case should be remanded to the court of appeals with instructions that petitioner's motion challenging the array be considered by the district court, after petitioner has been afforded an opportunity to inspect the jury lists. See *United States* v. *Beaty, supra.*

III

PETITIONER FAILED TO MAKE A SUFFICIENT CLAIM OF A CONSTITUTIONAL VIOLATION TO WARRANT HIS BEING GRANTED, ON THAT BASIS, DISCOVERY OF JURY SELECTION RECORDS AND AN EVIDENTIARY HEARING

If this Court agrees with our construction of the Jury Selection and Service Act of 1968, it is unnecessary to consider the constitutional questions which petitioner now raises. Indeed, in our view, as a result of the requirements of the Act, constitutional claims will rarely be encountered in the context of federal jury selection.[9] As this Court has repeatedly held, the Constitution requires no more than that jury selection be free of purposeful discrimination. See, *e.g.*, *Whitus* v. *Georgia*, 385 U.S. 545; *Swain* v. *Alabama*, 380 U.S. 202. Absent systematic exclusion, "[t]he mere fact of inequality in the number selected does not in itself show discrimination." *Akins* v. *Texas*, 325 U.S. 398, 403.

The Act, including both the cross sectional and nondiscrimination of Sections 1861, 1862 and 1863 assures that the constitutional standard will be satisfied in federal jury selection. Petitioner's suggestion that

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[9] 28 U.S.C. 1867(e) provides that the challenge procedures established by the Act shall be exclusive but that nothing shall prevent a party from pursuing any remedy which may be available for enforcement of any law prohibiting discrimination in jury selection. This provision has been interpreted to permit a party who made an untimely challenge under the Act nevertheless to present a claim based on constitutional grounds. See, *e.g.*, *United States* v. *DeAlba-Conrado*, 481 F.2d 1266 (C.A. 5).

underrepresentation resulting from the use of voter lists as the sole source of prospective jurors rises to the level of a constitutional violation is without merit. In the absence of an allegation of a past or present pattern of electoral discrimination, and in the absence of an allegation of violation of the random selection principle, deficiencies resulting from the use of voter lists as a source for jurors are statutory and not constitutional. Since petitioner has not made such allegations, his claim of underrepresentation fails, as a matter of law, to present a *prima facie* constitutional question.

CONCLUSION

For the foregoing reasons, the case should be remanded to the court of appeals with instructions that it be remanded to the district court for consideration of petitioner's motion challenging the array after petitioner has been afforded an opportunity to inspect the jury lists.

Respectfully submitted.

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